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**MAR 13 2007**

**OFFICE OF PETITIONS**

In re Application of :  
Theoharis Theoharides : DECISION ON PETITION  
Application No. 10/811,859 :  
Filed: March 30, 2004 :  
Attorney Docket No. 51275/152 :

This is in response to the "PETITION TO REVIVE AN APPLICATION FOR PATENT ABANDONED UNAVOIDABLY UNDER 37 CFR 1.137(a)," filed December 7, 2006.

The petition under § 1.137(a) is **DISMISSED** without consideration on the merits.

Any renewed petition must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR §1.137(a)" or "Renewed Petition under 37 CFR §1.137(b)," as appropriate. Extensions of time under 37 CFR §1.136(a) are permitted.

The above-identified application became abandoned for failure to file a timely reply to the Office action mailed March 13, 2006. This Office action set a three-month period for reply, with extensions of time obtainable under § 1.136(a). No reply received and no extension obtained, the application became abandoned on June 14, 2006. A Notice of Abandonment was mailed on October 23, 2006.

In response, Applicant filed this petition, asserting that the delay in filing a reply to the Office action was unavoidable. Applicant asserts that the Office action was never received by

his attorney. The petition did not include payment of the petition fee or a response to the Office action.

37 CFR 1.137(a) provides, in pertinent part, that:

If the delay in reply by applicant or patent owner was unavoidable, a petition may be filed pursuant to this paragraph to revive an abandoned application. A grantable petition pursuant to this paragraph must be accompanied by:

- (1) The reply required to the outstanding Office action or notice, unless previously filed;
- (2) The petition fee as set forth in § 1.17(l);
- (3) A showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and
- (4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (d) of this section.

35 U.S.C. 41(a) (7) provides that a petition for the revival of an unintentionally abandoned application or for the unintentionally delayed payment of the issue fee must be accompanied by the petition fee set forth in 37 CFR 1.17(m), unless the petition is filed under 35 U.S.C. 133 or 151 (on the basis of unavoidable delay), in which case the fee is set forth in 37 CFR 1.17(l). Thus, unless the circumstances warrant the withdrawal of the holding of abandonment (i.e., it is determined that the application is not properly held abandoned), the payment of a petition fee to obtain the revival of an abandoned application is a statutory prerequisite to revival of the abandoned application, and cannot be waived.

In addition, the phrase "[o]n filing" in 35 U.S.C. 41(a) (7) means that the petition fee is required for the filing (and not merely the grant) of a petition under 37 CFR 1.137. See H.R. Rep. No. 542, 97th Cong., 2d Sess. 6 (1982), reprinted in 1982 U.S.C.C.A.N. 770 ("[t]he fees set forth in this section are due on filing the petition"). Therefore, the Office: (A) will not refund the petition fee required by 37 CFR 1.17(l) or 1.17(m), regardless of whether the petition under 37 CFR 1.137 is dismissed or denied; and (B) will not reach the merits of any petition under 37 CFR 1.137 lacking the requisite petition fee.

The circumstances do not warrant withdrawal of the holding of abandonment. The application is properly abandoned. The petition does not include an adequate showing of non-receipt. In the absence of demonstrated irregularities in mailing of an Office action, petitioner must submit evidence to overcome this presumption. The showing required to establish non-receipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. In addition, a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. The petition does not include the required docket records. More importantly, the record shows that, in contradiction to the conclusion that the Office action was not received, on September 13, 2006, attorney for applicant filed on September 13, 2006 a request for extension of time for response to the March 13, 2006 Office action.

The petition fee set forth in 37 CFR 1.17(1) is currently \$250 for a small entity and \$500 for a large entity. As petitioner has not submitted a petition fee, the Office will not reach the merits of the instant petition.


Further correspondence with respect to this decision should be addressed as follows:

By mail:           Mail Stop Petition  
                  Commissioner for Patents  
                  P.O. Box 1450  
                  Alexandria, VA 22313-1450

By fax:           (571) 273-8300  
                  ATTN: Office of Petitions

By hand:          Customer Service Window  
                  Randolph Building  
                  401 Dulany Street  
                  Alexandria, VA 22314

Telephone inquiries related to this decision may be directed to the undersigned at (571) 272-3219.

A handwritten signature in black ink, appearing to read "Nancy Johnson". The signature is fluid and cursive, with the first name "Nancy" being more prominent than the last name "Johnson".

Nancy Johnson  
Senior Petitions Attorney  
Office of Petitions